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OVERSIGHT HEARINGS ON THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT 1961

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HEARINGS

BEFORE THE

SUBCOMMITTEE ON LABOR STANDARDS

OF THE

COMMITTEE ON EDUCATION AND LABOR

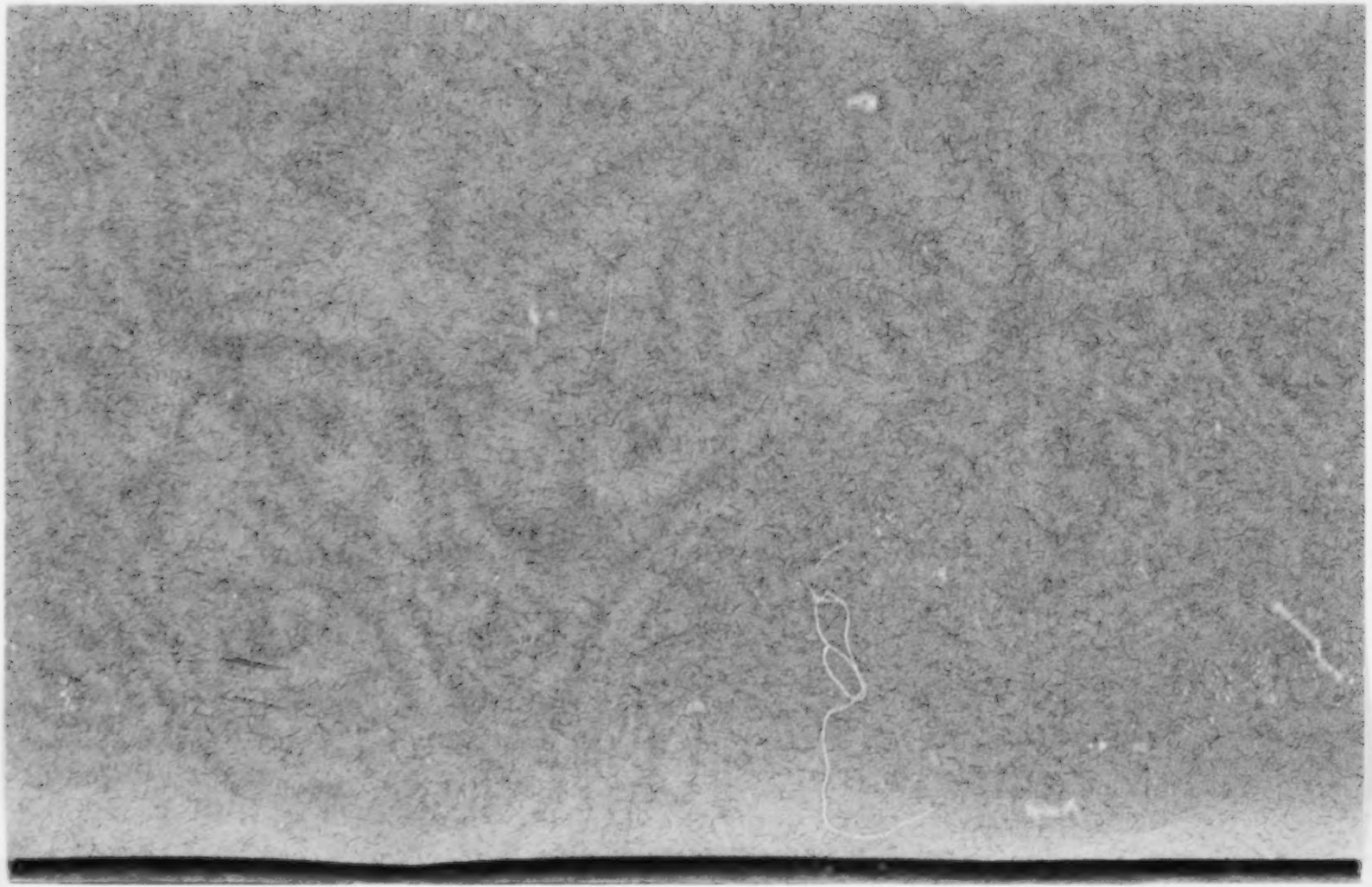
HOUSE OF REPRESENTATIVES

NINETY-SIXTH CONGRESS

FIRST SESSION

HEARINGS HELD IN WASHINGTON, D.C., ON NOVEMBER 13, 14, 15, 27; AND DECEMBER 6, 1979

Printed for the use of the Committee on Education and Labor



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INTRODUCTION

This is a supplement to the subcommittee's oversight hearings in the 96th Congress on the Longshoremen's and Harbor Workers' Compensation Act which are available in a separate volume. The following material submitted by Hon. John N. Erlenborn, a Representative in Congress from the State of Illinois, was inadvertently omitted from the original hearing record.

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96TH CONGRESS
2D SESSION

H. R. 7610

To amend the Longshoremen's and Harbor Workers' Compensation Act to revise the manner of computing the benefits provided under such Act, to provide for certification of physicians eligible to provide medical care to workers covered by such Act, to provide for an attorney to serve as the representative of the special fund established under such Act, to establish a Benefits Review Board the members of which are appointed by the President, to establish an advisory committee to evaluate the manner in which the provisions of the Act are carried out, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JUNE 18, 1980

Mr. ERLENBORN (for himself, Mr. EDWARDS of Alabama, Mr. EDWARDS of Oklahoma, Mr. GOODLING, Mr. MCCLOSKEY, and Mr. BUCHANAN) introduced the following bill; which was referred to the Committee on Education and Labor

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A BILL

To amend the Longshoremen's and Harbor Workers' Compensation Act to revise the manner of computing the benefits provided under such Act, to provide for certification of physicians eligible to provide medical care to workers covered by such Act, to provide for an attorney to serve as the representative of the special fund established under such Act, to establish a Benefits Review Board the members of which are appointed by the President, to establish an advi-

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sory committee to evaluate the manner in which the provisions of the Act are carried out, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) this Act may be cited as the "Longshoremen's and Harbor Workers' Compensation Act Amendments of 1980".

(b) Except as otherwise specifically provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Longshoremen's and Harbor Workers' Compensation Act.

SEC. 2. (a) Section 2(3) of the Act is amended to read as follows:

"(3)(A) The term 'employee' means any person who—

"(i) was employed as a longshoreman, ship repairman, ship builder, ship breaker, or harbor worker, and

"(ii) was directly engaged in activities relating to such employment (as described under paragraphs (23) through (25),

when the injury resulting in such person's disability or death occurred. Such term shall not include any person described under subparagraph (B) of this paragraph.

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"(B) The term 'employee' shall not include any of the following individuals:

"(i) A master, or member of a crew, of any vessel.

"(ii) Any officer or other person employed by the United States or any agency thereof, by any State or foreign government, or by any political subdivision thereof.

"(iii) Any person who, at the time of injury, was engaged in administration, clerical, custodial, delivery, maintenance, or repair of gear or equipment, security, timekeeping, rail car loading and unloading, mechanical, truck loading or unloading, warehousing, or any other employments not direct and integral parts of vessel loading, unloading, repairing, building, or breaking.

"(iv) Any person who, at the time of injury, was providing services on or for any vessel less than sixty-five feet in length, but only if such person was covered by a State workers' compensation program at such time.".

(b) Section 2(4) of the Act is amended to read as follows:

"(4) The term 'employer' means any person who employs one or more employees.".

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(c) Section 2(13) of the Act is amended to read as follows:

"(13) 'Wages' means the money rate at which the service rendered by an employee is recompensed by the employer under the contract of hiring in force at the time of the injury, including the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle C of the Internal Revenue Code of 1954 (relating to employment taxes)."

(d) Section 2 of the Act is amended by adding at the end thereof the following new paragraphs:

"(23) The term 'longshoreman' means any person engaged in the loading or unloading of cargo between (A) vessels upon the navigable waters of the United States and (B) the point of rest.

"(24) The terms 'ship repairman', 'ship builder', and 'ship breaker' mean any person engaged in the construction, repair, or dismantling of a vessel while such person is upon the navigable waters of the United States or floating drydock thereupon, but not while such person is upon piers, wharves, building ways, marine railways, graving docks, shops, or any other facilities or areas over land customarily used in ship repairing, ship building, or ship breaking.

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"(25) The term 'harbor worker' means any person engaged in the performance of services on or for a vessel while such person is upon the navigable waters of the United States, other than any person covered by a State workers' compensation law.

"(26) The term 'point of rest' means—

"(A) when used in connection with bulk, breakbulk, or other noncontainerized cargo, (i) the area on the terminal facility, pier, elevator, or wharf which is assigned for the receipt of inbound cargo from the vessel and from which inbound cargo may be delivered to the consignee, or (ii) the area which is assigned for the receipt of outbound cargo from shippers for vessel loading; and

"(B) when used in connection with containerized cargo, (i) the area on the pier, wharf, or terminal to which inbound cargo is immediately transported after the unloading of a vessel, or (ii) in the case of outbound cargo, the area from which containerized cargo is immediately transported to the vessel for loading.".

SEC 3. Section 3(a) of the Act is amended to read as follows:

"SEC. 3. (a) Compensation shall be payable under this Act in respect of the disability or death of an employee.".

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SEC. 4. (a) Section 6(b)(1) of such Act is amended to read as follows:

"(b)(1) Except as provided in subsection (c), compensation for disability or death shall not exceed an amount equal to the lesser of the following:

"(A) An amount equal to 80 per centum of the employee's spendable earnings.

"(B) An amount equal to 200 per centum of the applicable national average weekly wage as determined by the Secretary under subsection (b)(3).".

(b) Section 6(d) of such Act is amended by striking out "under this subsection" and inserting in lieu thereof "under subsection (b)(3)".

(c) Section 6 of the Act is amended by adding at the end thereof the following new subsections:

"(e) For purposes of this Act, the spendable earnings of an employee shall be the employee's average weekly wage computed in accordance with section 10 (and adjusted to the nearest whole dollar) reduced by the amounts required to be withheld from such wage under Federal and State tax laws. For purposes of the preceding sentence, the amounts required to be withheld shall be determined on the basis of the reasonable anticipated liability of the employee for tax for the taxable year in which such payments are made without regard to any deduction or credit, other than the deduction for per-

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sonal exemptions under section 151 of the Internal Revenue Code of 1954 or under similar provisions of State law.

"(f)(1) As soon as practicable after the date of the enactment of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1980, the Secretary shall publish in the Federal Register tables showing the amount of spendable earnings at various wage levels for both married and single employees, as determined under subsection (e) of this section in accordance with the withholding tax tables then in effect. Each January 1 thereafter the Secretary shall review such tables and revise them for that calendar year if there has been a change in the withholding tax tables or in the maximum weekly rate of compensation, and the Secretary shall publish such tables as so revised in the Federal Register.".

SEC. 5. (a) Subsections (b) through (f) of section 7 of the Act are amended to read as follows:

"(b) Within such reasonable time period as the deputy commissioner may specify after the date of the enactment of this subsection, each employer may submit to the deputy commissioner for the compensation district in which the place of business of the employer a list containing the recommendations of the employer of those physicians whom the employer considers suitable for designation by the deputy commissioner as authorized attending physicians under this Act. Within

sixty days after the expiration of the period referred to in the preceding sentence, and after reviewing the recommendations submitted by employers, the deputy commissioner shall determine which of the physicians so nominated by employers are suitable for designation under this subsection and shall establish a listing (subdivided according to geographic regions to the extent appropriate) of those physicians who are authorized to provide medical services as attending physicians under this Act. In determining the number of physicians who should be authorized to provide such services within any area, the deputy commissioner shall take into account the number of competent and impartial physicians conveniently available to the community in which the medical service is required. Each employer shall post the names and addresses of all physicians including in the listing in such manner as to afford his employees reasonable notice thereof.

"(c)(1) An employee may choose as an attending physician any physician included under an applicable listing established by the deputy commissioner under subsection (b). If an employee is unable to select his own physician because of the nature of his injury, and if such injury necessitates that the employee obtain immediate medical treatment, the employer shall select a physician for the employee. An employee who requires immediate medical treatment, and who receives such treatment from a physician not authorized to provide such

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services under subsection (b), may continue to receive treatment from such physician unless the deputy commissioner determines otherwise under paragraph (2).

"(2) The deputy commissioner shall actively supervise the medical care rendered to injured employees, shall require periodic reports concerning such care, shall have authority to determine the necessity, character, and sufficiency of medical care rendered or to be rendered to injured employees, and may order a change of physicians or hospitals on his own initiative or at the request of the employer when he determines such change to be desirable in order to provide for effective medical care at a reasonable cost.

"(3)(A) An attending physician shall not refer an employee to a medical specialist or consultant physician unless the attending physician—

"(i) notifies the employer of the name and address of the medical specialist or consultant physician;

"(ii) provides to the employer and deputy commissioner a written statement of the reasons for the referral; and

"(iii) has transmitted a medical report to the employer and to the deputy commissioner not later than ten days after the date of the attending physician's first treatment of the employee.

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"(B) The employer, its insurance carrier, or the employee shall not be liable for the expenses incurred as a result of a referral to any medical specialist or consultant physician unless—

"(i) the attending physician has complied fully with the requirements of subparagraph (A) of this paragraph; and

"(ii) the medical specialist or consultant physician furnishes a written narrative report to the employer and to the deputy commissioner within twenty-one days after the date of the first examination or treatment of the employee by such specialist or consultant physician.

"(d)(1) An employee shall not be entitled to recover under this Act any amount expended by him for medical or other treatment or services unless—

"(A) such treatment, if obtained from an attending physician, is obtained as provided under subsection (b)(1); and

"(B) written notice of such treatment or services is provided to the employer within ten days after the date of the first treatment or provision of services.

"(2) No employer or employee shall be liable to any physician for any claim for medical or surgical treatment provided to an employee unless the physician provides to the

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employer, the employee, and the deputy commissioner, within ten days after the date of the first treatment of the employee by such physician, a written report of the injury, and the treatment or services provided, on a reporting form prescribed by the Secretary. The provisions of this paragraph shall not be applicable with respect to the medical specialists or consultant physicians referred to in subsection (c)(2)(B)(ii).

"(3) If an employee at any time unreasonably refuses to submit to medical or surgical treatment, or to an examination by a physician selected by the employer, the deputy commissioner shall suspend the compensation proceedings. If compensation proceedings are suspended under this paragraph, the employer shall not be liable for penalties, attorneys' fees, or for compensation payments that would otherwise have been payable for the period of the suspension.

"(e)(1) The deputy commissioner shall designate, by medical specialty, physicians who shall be authorized to provide independent medical examinations in accordance with this subsection. The names of physicians so designated in the community or compensation district shall be made available to employees and employers through posting, or by any other appropriate means. When medical questions are raised in a case, the employer may require the employee to be examined by a physician authorized under this subsection and to obtain from such physician a report containing (A) his evaluation of

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the employee's physical impairment (determined in accordance with American Medical Association Guides to the Evaluation of Impairment), and (B) such other information as may be appropriate.

"(2) In the case of any employee who had an existing physical impairment or disability at the time of the injury for which the examination is requested under paragraph (1) (hereinafter in this paragraph referred to as the 'subsequent injury'), the physician conducting the independent examination shall, upon the request of the employer, submit a report to the employer, employee, and deputy commissioner stating—

"(A) whether at the time of the examination the employee has a permanent physical impairment or disability greater than that which existed before the subsequent injury; and

"(B) if the permanent impairment or disability is determined, under subparagraph (A), to be greater as a result of the subsequent injury, whether—

"(i) such impairment or disability is attributable only to the subsequent injury; or

"(ii) the permanent physical impairment or disability found at the time of the independent examination is the result of both the preexisting

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physical impairment or disability and the subsequent injury.

If the physician conducting the independent medical examination concludes that the permanent physical impairment or disability existing at the time of the examination is not due solely to the subsequent injury and is greater than the preexisting physical impairment or disability, the employer shall be entitled to the relief available under section 8(f) of this Act.

"(3) Any employer or employee dissatisfied with the report submitted under paragraph (2) may request a reexamination of the employee by one or more physicians authorized under paragraph (1). Upon the request of an employer or employee, the deputy commissioner shall order such reexamination unless he finds that it is clearly unwarranted. Such reexamination shall be completed within fourteen days after the date ordered unless the deputy commissioner finds that because of extraordinary circumstances a longer period is required. The deputy commissioner may charge the cost of any reexamination under this subsection to the employer (if the employer is a self-insurer), to the insurance company which is carrying the risk, or to the employee, in appropriate cases, or to the special fund established under section 44.

"(4) An employee shall submit to physical examinations required under subsection (e) at such place as the deputy commissioner may designate which is reasonably convenient

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for the employee. No physician selected by the employer, carrier, or employee shall be present at or participate in any manner in such examination. However, the conclusions of such physicians as to the nature or extent of impairment or the cause of impairment shall be available to the examining physician unless otherwise ordered, for good cause, by the deputy commissioner. Proceedings shall be suspended for any period during which the employee may refuse to submit to examination under this subsection. The employer shall not be liable for penalties, attorneys' fees, or for compensation payments that would otherwise have been payable for the period of the suspension.

"(f) All fees and other charges for medical examination, treatment, or service shall be limited to such reasonable charges as prevail in the community for such treatment, and shall be subject to regulation by the deputy commissioner.".

(b) Subsections (g) and (i) of section 7 of the Act are repealed, and subsection (h) is redesignated as subsection (g).

SEC. 6. (a) Subsections (a) and (b) of section 8 of the Act are amended to read as follows:

"(a) PERMANENT TOTAL DISABILITY.—Subject to the limitations of section 6(b)(1), in the case of total disability determined to be permanent, 80 per centum of the spendable earnings (as defined in section 6(e)) of the employee shall be paid to the employee during the continuance of such total

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disability. Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or the loss of any combination of two such body parts, shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. In all other cases there shall be a determination of total disability only if the employee proves by substantial evidence that as a result of the injury he is permanently unable to earn any wages in any employment.

"(b) TEMPORARY TOTAL DISABILITY.—Subject to the limitations of section 6(b)(1), in the case of total disability determined to be temporary, 80 per centum of the spendable earnings of the employee (as defined in section 6(e)) shall be paid to the employee during the continuance of the disability, except that such compensation shall not be paid after the employee attains the retirement age prevailing in the industry and geographical region within which the employee was employed at the time of the injury.".

(b)(1) Section 8(c) of such Act is amended by striking out "66⅔ per centum of the average weekly wages" and inserting in lieu thereof "80 per centum of the spendable earnings of the employee (as defined in section 6(e)), subject to the limitations of section 6(b)(1),".

(2) Section 8(c)(21) of such Act is amended to read as follows:

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"(21) OTHER CASES.—(A) Subject to the limitations of section 6(b)(1), in all other cases in this class of disability the compensation shall be 66⅔ per centum of the difference between his average weekly wages and his wage earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, except that such compensation shall not be paid after the injured employee attains the retirement age prevailing in the industry and geographic region within which the employee was employed at the time of the injury.

"(B) If an employee suffers injuries to a body area enumerated under any of the preceding paragraphs of this subsection, the employee shall be required to seek compensation under any such applicable paragraph and shall not be eligible to receive any additional compensation under this paragraph.

"(C)(i) Notwithstanding the provision of any compensation order, the employer may (I) reduce the payment of compensation during any period in which the employee's actual wages in the same or other employment or his wage earning capacity (as defined in section 8(h)), have increased, or (II) suspend such payment during any period in which such wages are determined to equal or exceed his average weekly wages

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before the injury. An employer may not reduce or suspend payments under this subparagraph before the date on which the employer submits notice thereof to the deputy commissioner, together with a detailed statement of reasons and relevant documentation pertaining to such action. Upon receipt of such notification, the deputy commissioner shall within thirty days review the action taken by the employer and shall either disapprove the action and require the payment to the employee of any compensation so withheld, or shall affirm the action (in whole or in part), modify the compensation order accordingly, and require the payment to the employee of any compensation withheld in excess of the amount permitted to be withheld under any action approved only in part. If the deputy commissioner fails to take action within thirty days as required under the preceding sentence, the reduction or suspension of payments by the employer shall be considered to be approved. Any party may submit a written request to the Board for a hearing before an administrative law judge to review the approval or disapproval of a reduction or suspension of compensation payments under this subparagraph.

"(ii) If the employee's actual wages or wage earning capacity (as defined in section 8(h)) decrease, solely

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as a result of the injury, during any period to an amount less than the average weekly wage of the employee before the date of the injury, the employee may submit a written request to the deputy commissioner for a review of his compensation payment, provided such request for review is filed within one year after the employee incurs the decrease or within one year after the date of the last payment of compensation, whichever period is the shorter.".

(d) Section 8(d) of the Act is amended by striking out paragraph (3) thereof and redesignating paragraph (4) as paragraph (3).

(e) Section 8(e) of the Act is amended by striking out "In" and inserting in lieu thereof "Subject to the limitations of section 6(b)(1), in".

(f) Section 8(f) of the Act is amended by adding at the end thereof the following new paragraph:

"(3)(A) Upon the recommendation of any organization representative of the interests of employer and insurance carriers which (i) is formed for the specific purpose of designating a fund representative under this section, and (ii) is recognized for such purpose by the Secretary, there shall be designated by the Secretary an attorney to serve as the representative of the special fund under section 44 (hereinafter in this paragraph referred to as the "fund representative").

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The Secretary shall cause notice to be given to the fund representative whenever application for apportionment is made pursuant to paragraph (1) or (2) of this subsection, and whenever hearing or proceedings involving the fund are to occur.

"(B) The fund representative—

"(i) shall be a party in any case in which an application for apportionment of compensation is made pursuant to paragraph (1) or (2) of this subsection, and shall have the same rights in any such case as any other party under this Act, including the right to enter into settlement of any claims brought against the fund;

"(ii) may hire such medical and other experts and witnesses as may be appropriate to defend any claim against the fund, the expenses for which shall be payable from the fund; and

"(iii) may hire such additional professional and clerical staff as may be required to enable the representative to competently perform his duties under this paragraph.".

(g) Subsections (g) through (i) of section 8 of the Act are amended to read as follows:

"(g) COMPENSATION FOR EMPLOYEES UNDERGOING VOCATIONAL REHABILITATION.—An employee who as a result of injury is undergoing vocational rehabilitation for remunerative employment under the direction of the deputy

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commissioner as provided by section 39(c) of this Act, or with the approval of the employer, shall be entitled to receive continued temporary total or partial compensation during the period of such rehabilitation. No award for permanent disability may be entered before the deputy commissioner determines, or the employer and employee agree, that vocational rehabilitation is unnecessary or until after vocational rehabilitation has been completed. If an employee unreasonably refuses to undergo vocational rehabilitation, the employee shall not be eligible to receive compensation payments that would otherwise be payable for the period of such refusal.

"(h) The wage earning capacity of an injured employee in cases of partial disability under subsection (c)(21) or subsection (e) of this section shall be the salary, wages, and other remunerations the employee is able to earn. In no case shall such amount be less than the amount actually being earned by the employee, including earnings from sheltered employment. If an employee voluntarily limits his income, or fails to accept employment commensurate with his abilities, the wage-earning capacity of the employee shall be considered to be the amount which would have been earned if the employee did not limit his income or if the employee accepted appropriate employment. Whenever compensation is payable under subsection (c)(21) or under subsection (e) the burden shall be on the employee to establish that any wage loss for

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which compensation is sought is the result of the compensable injury.

"(i)(1) No settlement agreed to by an employee and by the employer, the insurance carrier, or both, shall discharge the liability of an employer or insurance carrier for benefits for disability or death under this Act unless an application for approval of the settlement is approved by the deputy commissioner. Any settlement approved under this subsection shall have the same effect as a compensation order. Notwithstanding sections 15 and 16 of this Act, whenever an application for approval of such settlement is submitted, the application shall be considered to be approved, and the liability of the employer or the insurance carrier for benefits shall be discharged, unless the deputy commissioner, within thirty days after the date of the receipt of the application, disapproves the settlement by issuing a written statement containing the reasons for disapproval. Any disapproval shall be based on valid, substantial reasons, as specified in such statement.

"(2) If the the deputy commissioner disapproves an application under paragraph (1), any party to the settlement may submit to the Board a request for a hearing limited to a determination of whether the disapproval of the application by the deputy commissioner was based on valid, substantial reasons. Any request for a hearing under this paragraph shall be in writing, and shall be transmitted to the Board by certi-

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fied mail. Such hearing shall be held before an administrative law judge, designated by the Chairman of the Board, within thirty days after the date on which the hearing is requested, and an order approving, rejecting, or modifying the deputy commissioner's action shall be issued within thirty days after the date of the completion of the hearing. Any such order shall be appealable in accordance with the provisions of section 21(b).

"(3) Under the terms of a settlement as referred to in paragraph (1), the liability of the employer for any benefit under this Act for disability or death, or any part of such liability, may be discharged by the payment of a lump sum equal to the present value of the agreed-upon future compensation or death benefit payments commuted under the settlement, computed at the annually compounded discount rate prevailing at the time of settlement in the city in which the headquarters of the applicable Compensation District is located. No application for approval of a settlement providing for a lump-sum payment (as described under this paragraph) shall be approved by the deputy commissioner unless the lump sum agreed upon by the parties to the settlement was determined on the basis of all relevant factors, including the probability of death, remarriage, or any other contingency which might reasonably affect the amount or duration of future compensation or death benefits.".

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SEC. 7. (a) Section 9 of the Act is amended by striking out ", or if the employee who sustains permanent total disability due to the injury thereafter dies from causes other than the injury".

(b) The first sentence of section 9(b) of the Act is amended by striking out "*Provided*, That the total amount payable shall in no case exceed 66⅔ per centum of such wages." and inserting in lieu thereof "The total amount payable shall in no case exceed the maximum benefit for which an employee is eligible as determined under section 6(b)(1).".

(c) Section 9(c) of such Act is amended by striking out "*Provided*, That the total amount payable shall in no case exceed 66⅔ per centum of such wages." and inserting in lieu thereof "The total amount payable shall in no case exceed the maximum benefit for which an employee is eligible as determined under section 6(b)(1).".

(d) Section 9(d) of such Act is amended—

(1) by striking out "66⅔ per centum of the average wages of the deceased" and inserting in lieu thereof "the maximum benefit for which an employee is eligible as determined under section 6(b)(1)"; and

(2) by striking out "66⅔ per centum of such wages" and inserting in lieu thereof "the maximum benefit for which an employee is eligible as determined under section 6(b)(1)".

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(e) Section 9(e) of such Act is amended to read as follows:

"(e) In computing death benefits, the average weekly wages of the deceased shall be considered to have been not less than the national average weekly wage as prescribed in section 6(b), but the total weekly benefits shall not exceed the lesser of the average weekly wages of the deceased or the maximum benefit which an employee is eligible to receive under section 6(b)(1).".

SEC. 8. Subsections (a) through (c) of section 10 of the Act are amended to read as follows:

"(a) If the injured employee worked during substantially the whole of the year immediately preceding his injury in the same employment in which he was working at the time of injury, whether for the same or another employer, his average weekly wage shall be one fifty-second part of the total wages earned by him in such employment.

"(b) If the injured employee worked during substantially the whole of the year immediately preceding his injury for the same or another employer in employment other than that in which he was working at the time of the injury, his average weekly wage shall be one fifty-second part of his actual earnings in such year. In no case shall the average weekly wage deter-

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mined pursuant to this subsection exceed one fifty-second part of the average total wages earned by other employees in the same or neighboring locality working in employment of the same (or most similar) type as the employment in which the employee was working at the time of the injury.

"(c) If the injured employee did not work during substantially the whole of the year preceding the injury, his average weekly wages shall be his actual earnings for the year preceding his injury divided by the number of weeks in which he had any earnings. In no case shall the average weekly wage determined pursuant to this subsection exceed one fifty-second part of the average total wages earned by other employees in the same or neighboring locality working in employment of the same (or most similar) type as the employment in which the employee was working at the time of the injury.".

(b) Section 10 of the Act is further amended—

(1) by striking out subsections (d), (e), and (g), and by redesignating subsections (f), and (h) (and any references thereto) as subsections (d) and (e); and

(2) by amending subsection (d) (as so redesignated) to read as follows:

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"(d) Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries sustained after the date of enactment of this subsection shall be increased—

"(1) by a percentage equal to the percentage (if any) by which the applicable national weekly wage for the period beginning on such October 1, as determined under section 6(b), exceeds the applicable national average weekly wage, as so determined, for the period beginning with the preceding October 1; or

"(2) by 3 per centum;

whichever percentage is less.".

SEC. 9. Section 12(d) of such Act is amended to read as follows:

"(d) Failure to give such notice shall bar any claim under this Act unless the employer had actual knowledge that the injury or death is, or is claimed to be, employment related.".

SEC. 10. (a) Section 14(b) of the Act is amended by striking out "knowledge of the injury or death" and inserting in lieu thereof "actual knowledge that the injury or death was, or is claimed to be, employment related".

(b) Section 14(d) of the Act is amended by striking out "has knowledge of the alleged injury or death" and inserting

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in lieu thereof "receives the notice of the filing of the claim from the deputy commissioner under section 19(b)".

(c) Section 14(f) of the Act is amended to read as follows:

"(f) If any compensation payable under the terms of an award is not delivered to the employee, or is not mailed postage prepaid to the employee, within fifteen days after the date the notice of award from the deputy commissioner is received by the employer, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof, which shall be paid at the same time as, but in addition to, such compensation. No such penalty shall be required to be paid if—

"(1) the employer submits to the Board a request for a review of the compensation order as provided under section 21; and

"(2) the employer pays all periodic payments due the employee pursuant to the award for the period commencing on the date the award was entered and ending on the date review proceedings concluded.".

(d) Section 14(g) of such Act is amended by striking out "sixteen" and inserting in lieu thereof "thirty".

(e) Section 14 of such Act is amended by striking out subsections (h) and (j) and by redesignating subsections (i),

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(k), and (l) (and any references thereto) as subsections (h), (i), and (j), respectively.

(f) Section 14 of such Act is amended by adding the following new subsections at the end thereof:

"(l) The total money allowance payable to or on behalf of an employee as compensation for any permanent partial disability under this Act shall in no event exceed in the aggregate the amount determined by multiplying the maximum compensation rate payable in accordance with section 6(b)(1) by 312.".

"(m)(1) Subject to section 10(d) of this Act, in no event shall the total weekly money allowance payable to an employee or his dependent survivors—

"(A) as compensation for an injury or death under this Act,

"(B) as Federal old-age, survivors, and disability insurance benefits (42 U.S.C. 401, et seq.),

"(C) from employee benefit plans subject to the Employee Retirement Income Security Act of 1974 (29 U.S.C. 101, et seq.; 26 U.S.C. 401, et seq.) (computed weekly),

"(D) as compensation in the nature of an unemployment benefit, or

"(E) as compensation in the nature of any other workers' compensation benefit (computed weekly),

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exceed in the aggregate 80 per centum of the spendable earnings of the employee (as determined under section 6(e)) at the time of the injury, computed on the basis of any applicable tax rate then in effect.

"(2) In determining the amounts payable to an employee or his dependent survivors under subparagraphs (B) through (E) of paragraph (1), such amounts shall be determined without regard to any offsets (with respect to sums payable under this Act) which may be required to be made under the provisions of any law or contract governing the terms of the benefits as referred to under such subparagraphs.

"(3) Subject to paragraph (4) of this subsection, if the computation under paragraphs (1) and (2) indicate that an employee or to his survivors receive in the aggregate from the benefits referred to under paragraph (1) an amount which exceeds 80 per centum of the spendable earnings of the employee (computed as provided under paragraph (1) and adjusted in accordance with section 10(d)), the amounts otherwise payable as compensation or death benefits under this Act shall be reduced by an amount equal to such excess.

"(4) If as a result of the reduction computed under this subsection an employee or his survivors do not receive in the aggregate from the benefits referred to under paragraph (1) an amount equal to the 80 per centum of the spendable earn-

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ings of the employee (computed as provided under paragraph (1) and adjusted in accordance with section 10(d)), the amounts payable as compensation or death benefits under this Act shall be increased accordingly upon the filing of a request for such increase to be submitted by the employee or his survivors pursuant to section 22.".

SEC. 11. (a) Section 19(a) of the Act is amended by adding at the end thereof before the period the following: "and to make such investigations as he considers necessary for such determinations regarding the claim".

(b) Section 19(c) of the Act is amended to read as follows:

"(c)(1) The deputy commissioner shall issue a preliminary ruling (containing his findings and recommendations) not later than one hundred and eighty days after the employee, employer, or insurance carrier notifies the deputy commissioner that—

"(A) the employee's medical condition has been certified as permanent and stationary by a physician treating or examining the employee; or

"(B) the employee has resumed employment of any type.

"(2) The preliminary ruling of the deputy commissioner shall be served on the parties personally, or by registered or certified mail. The deputy commissioner shall include with

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such ruling a statement notifying the parties of their right to appeal any findings or recommendations contained in the ruling by submitting to the Board, within thirty days after receipt of the ruling, a request for a hearing, together with notice of which findings and recommendations contained in the preliminary ruling shall be appealed.

"(3) If no request for a hearing is made under paragraph (2), the preliminary ruling of the deputy commissioner shall be considered to be a final order and shall not be subject to review under section 21 of this Act by any administrative law judge, by the Board, or by any court.".

(b) Section 19 of such Act is further amended by striking out subsections (d), (e), and (h), and by redesignating subsections (f) and (g) (and any references thereto) as subsections (d) and (f), respectively.

SEC. 12. Section 20 of the Act is hereby repealed.

SEC. 13. (a) Subsections (a) through (c) of section 21 of the Act are amended to read as follows:

"(a)(1) There is established a Benefits Review Board which shall be composed of three members appointed by the President, by and with the advice and consent of the Senate, from among persons who by reason of training, education, and experience are qualified to carry out the functions of the Board under this Act. The President shall designate one of the members of the Board to serve as Chairman.

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"(2)(A) The terms of members of the Board shall be six years except that of the members first appointed (i) one shall serve for a term of two years, (ii) one shall serve for a term of four years, and (iii) one shall serve for a term of six years, as designated by the President at the time of appointment. A member of the Board may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.

"(B) A vacancy in the Board shall be filled in the same manner in which the original appointment was made. Any member appointed to fill a vacancy occuring before the expiration of the term for which his predecessor was appointed shall be appointed only for the remainder of such term. A member may serve after the expiration of his term until his successor has taken office.

"(3)(A) The principal office of the Board shall be in the District of Columbia. Whenever the Board deems that the convenience of the public or parties may be promoted, or delay or expense may be minimized, it may hold hearings or conduct other proceedings at any other place.

"(B) Every official act of the Board shall be on the record, and its hearings and record shall be open to the public.

"(4) For the purpose of carrying out its functions under this Act, two members of the Board shall constitute a

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quorum and official action can be taken only on the affirmative vote of at least two members.

"(5) The Chairman shall be responsible for carrying out the administrative duties of the Board, but may delegate such functions to any other member of the Board. The Chairman may appoint and fix the pay of such administrative law judges and other employees as he considers necessary to assist the Board in the performance of its functions. The assignment, removal, and compensation of administrative law judges shall be in accordance with sections 3105, 3344, 5372, and 7521 of title 5, United States Code.

"(6)(A) The Board may, for the purpose of carrying out its duties under this Act, hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence, as the Board considers appropriate. The Board may administer oaths or affirmations to witnesses appearing before it, and may order testimony to be taken by deposition in any proceedings pending before it at any time during the proceedings. Witnesses whose depositions are taken under this paragraph, and the persons taking such depositions, shall be entitled to the same fees as are paid for comparable services in the courts of the United States.

"(B) The Board may issue subpenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation

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by the Board. Such attendance of witnesses and the production of such evidence may be required from any place within the United States at any designated place of hearing within the United States. The subpenas of the Board shall be served in the manner provided for subpenas issued by a United States district court under the Federal Rules of Civil Procedure for the United States district courts.

"(b)(1)(A) If a request for a hearing to review any determination of the deputy commissioner is submitted to the Board in accordance with this Act, the Board shall provide the parties with an opportunity for a hearing on the record before an administrative law judge designated to hear and determine the case by the chairman of the Board. Any such hearing shall be conducted in accordance with section 554 of title 5, United States Code. Within thirty days after the hearing is concluded, the administrative law judge shall, by order, make an award for compensation or shall reject the claim of the employee.

"(B) A compensation order issued by an administrative law judge shall become effective when filed in the office of the Board unless any party to the proceeding submits written notice to the Board and to the deputy commissioner appealing the order and requesting a hearing before the Board under paragraph (2). Any such notice of appeal may be sub-

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mitted by a party not later than the thirtieth day after the date of the receipt of a copy of the order.

"(C) The payment of the amounts required by an award pursuant to an order of an administrative law judge, other than the periodic payment of compensation or death benefits, shall be stayed pending final decision in any review proceeding before the Board.

"(2)(A) Upon the filing of an appeal of any order issued by an administrative law judge under paragraph (1), the Board shall conduct proceedings to review such order whenever a substantial question of law or fact is raised by the party requesting the review. Actions in proceedings before the Board shall be taken in accordance with the Federal Rules of Civil Procedures to the extent that such rules may be applicable, unless the Board has adopted a different rule. The order of the Board shall be based upon the hearing record in such proceedings. The findings of fact and the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole.

"(B) A compensation order issued by the Board shall become effective when filed in the office of the Board unless any party to the proceeding files for a review of the order by a court in accordance with subsection (c).".

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(b) Section 21(c) of the Act is amended by striking out the last three sentences thereof and inserting in lieu thereof the following: "Payment of the amounts required by an award, other than the periodic payment of compensation or death benefits, shall be stayed pending final decision in any such proceeding.".

(c)(1) Upon the appointment of members to the Board established by the amendment made to the Longshoremen's and Harbor Workers' Compensation Act by subsection (a) of this section, all officers, employees, assets, liabilities, contracts, property, and records of the Benefits Review Board in the Department of Labor shall be transferred to such Board. Until the date that all members are so appointed, the Benefits Review Board in the Department of Labor shall continue to function for the purpose of determining appeals from the orders of administrative law judges, and shall have during such interim period the authority provided to such Board under the amendment made by subsection (a) and by section 11 of this Act to designate administrative law judges to hear and determine appeals from rulings of the deputy commissioner.

(2) All orders, determinations, rules, regulations, grants, contracts, agreements, permits, licenses, privileges, and other actions which have been issued, granted, made, undertaken, or entered into in the performance of any function transferred

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under this subsection shall continue in effect according to their terms until modified, terminated, superseded, set aside, or revoked in accordance with law by any authorized official, a court of competent jurisdiction, or by operation of law.

(3) No suit, action, or other proceeding lawfully commenced by or against the Board or any officer of the United States acting in his official capacity shall abate by reason of any transfer under this section.

SEC. 14. Section 21a of such Act is hereby repealed.

SEC. 15. Section 23 of such Act is hereby repealed.

SEC. 16. Section 24 of such Act is amended to read as follows:

"SEC. 24. (a) No person shall be required to attend as a witness in any proceeding before a deputy commissioner or an administrative law judge at a place outside of the State of his residence and more than one hundred miles from his place of residence, unless his lawful mileage and fee for one day attendance shall be first paid or tendered to him; but the testimony of the claimant and any other witnesses may be taken at any time following the filing of a claim for compensation or death benefits by deposition or interrogatories according to the rules of practice of the Federal district court for the judicial district in which the injury occurred (or in the United States District Court for the District of Columbia if the injury occurred in the District).

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"(b)(1) On any matter within the jurisdiction of the deputy commissioner or an administrative law judge appointed by the Board, the deputy commissioner or such judge shall have the following authorities:

"(A) The deputy commissioner or administrative law judge may issue subpenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation by the deputy commissioner or such judge. The subpenas shall be served in the manner provided for subpenas issued by a United States district court under the Federal Rules of Civil Procedure for United States district courts.

"(B) The deputy commissioner or administrative law judge may take such testimony, examine such witnesses, and receive such evidence as they consider appropriate to the proceedings conducted by them, and may require the production of books, papers, documents, and other evidence at any hearing or discover proceeding in a manner consistent with the Federal Rules of Civil Procedure. The deputy commissioner or such judge may administer oaths or affirmations to witnesses appearing before them.

"(c) If any person in proceedings before a deputy commissioner, administrative law judge, or Board disobeys or re-

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sists any lawful order or process, or misbehaves during a hearing or so near the place thereof as to obstruct the same, or neglects to produce, after having been ordered to do so, any pertinent book, paper, or document, or refuses to appear after having been subpenaed, or upon appearing refuses to take the oath of a witness, or after having taken the oath refuses to be examined according to law, the deputy commissioner, administrative law judge, or Board shall certify the facts to the district court having jurisdiction in the place in which he is sitting (or to the United States District Court for the District of Columbia if he is sitting in such District) which shall thereupon in a summary manner hear the evidence as to the acts complained of, and, if the evidence so warrants, punish such person in the same manner and to the same extent as for a contempt committed before the court, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of or in the presence of the court.".

SEC. 17. Section 25 of the Act is amended by inserting "or administrative law judge" after "deputy commissioner".

SEC. 18. Section 27 of the Act is repealed.

SEC. 19. Section 28 of the Act is amended to read as follows:

"SEC. 28. (a) No claim for legal services or for any other services rendered in respect of a claim or award for

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compensation, to or on account of any person, shall be valid unless approved by the Board, or if proceedings for review of the order of the Board in respect of such claim or award are conducted before any court, unless approved by such court. Any claim so approved shall, in the same manner and to the same extent fixed by the Board or such court, be a lien upon such compensation.

"(b) If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation on the ground that there is no liability for compensation within the provisions of this Act and the person seeking benefits shall thereafter utilize the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to a compensation order, a reasonable attorneys' fee against the employer and carrier for services rendered before the Board or reviewing court. Such fee shall be paid directly by the employer or carrier to the attorney for the claimant in a lump sum after the compensation order becomes final.

"(c) In no case other than as provided in subsection (b) of this section shall any claim for legal services rendered to any person seeking benefits or compensation according to the provisions of this Act be assessed against the employer or carrier.

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"(d) Any person who receives any fees, other consideration, or any gratuity on account of services rendered as a representative of a claimant, unless such consideration or gratuity is approved by the Board or court, or who makes it a business to solicit employment for a lawyer, or for himself in respect of any claim or award for compensation, shall upon conviction thereof, for each offense be punished by a fine of not more than $1,000 or by imprisonment for not more than one year, or by both such fine and imprisonment.".

SEC. 20. Section 30(f) of the Act is amended to read as follows:

"(f) Where the employer or the carrier has been given notice or has actual knowledge that injury to or death of an employee is claimed to be employment related and fails, neglects, or refuses to file report thereof as required by the provisions of subsection (a) of this section, the limitations in section 13(a) of this Act shall not begin to run against the claim of the injured employee or his dependents entitled to compensation, or in favor of either the employer or the carrier, until such report shall have been furnished as required by the provisions of subsection (a) of this section.".

SEC. 21. (a) Section 33(b) of the Act is amended by inserting ", administrative law judge," before "or Board".

(b) Section 33(e) of the Act is amended by striking out "deputy commissioner or".

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(c) Section 33(f) of the Act is amended to read as follows:

"(f)(1) If the person entitled to compensation institutes proceedings within the period described in subsection (b) of this section, the employer shall be required to pay as compensation under this Act a sum equal to any amount by which the amount which the Secretary determines is payable on account of such injury or death exceeds the amount recovered in such proceedings against any such third person.

"(2) Any amount recovered by the person entitled to compensation on account of such proceedings by judgment or settlement, whether or not the settlement is approved by the employer in accordance with subsection (g) of this section, shall be distributed as follows:

"(A) The person entitled to compensation shall pay to the employer an amount equal to the sum of—

"(i) the cost of all benefits furnished to him by the employer under section 7; and

"(ii) all other amounts payable as compensation or benefits under this Act.

"(B) The person entitled to compensation or his representative shall retain the balance of the amount.

"(3) The employer will receive credit for future compensation or medical benefits from the amount retained by the employee under paragraph (2)(B), before payment of attor-

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neys' fees and expenses, and such credit shall be the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule provided by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 7, to be estimated by the deputy commissioner.".

(c) Section 33(g) of such Act is amended to read as follows:

"(g)(1) If the person entitled to compensation (or his representative) enters into a settlement with any third person referred to in subsection (b) for an amount less than the compensation to which such person or representative would be entitled under this Act, the employer shall be liable for compensation as determined under subsection (f) only if written approval of the settlement is obtained from the employer and its insurance carrier, before such settlement is executed, by the person entitled to compensation (or such representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after such settlement is entered into.

"(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any judgment obtained from a third person, and regardless of whether the employer or its insurer has made payments or acknowledged entitlement to the

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benefits of this Act, all rights to compensation under this Act shall be terminated.".

SEC. 22. (a) Section 39(c)(1) of such Act is amended by striking out ", upon request," and inserting in lieu thereof "not".

(b) After the date of the enactment of this Act, the Secretary shall be eligible to participate in proceedings relating to this Act which are before any court, as provided under section 21(c), only as an intervenor.

SEC. 23. Section 40(f) of such Act is amended by inserting between "deputy commissioner" and "or Board Member" the words ", administrative law judge," in both instances.

SEC. 24. Section 44(j)(2) of such Act is amended to read as follows:

"(2) under sections 8(f), (g), and (i), 10(e)(2), 18(b), 39(c)(2), and 53."

SEC. 25. Sections 45, 46, and 47 of such Act are repealed.

SEC. 26. The Act is further amended by adding at the end thereof the following new section:

"SEC. 53. (a)(1) There is hereby established an Advisory Committee on Longshoremen's and Harbor Workers' Compensation (hereinafter in this section referred to as the 'Committee') which shall be composed of nine members appointed by the President from among persons who by reason

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of training, education, and experience are qualified to carry out the functions of the Advisory Committee. Three members shall be appointed from among representatives of employees; three members shall be appointed from among representatives of employers, one of whom shall be a representative of insurers; and three members shall be representatives of the general public, one of whom shall be a representative of State governments. The President shall designate one of the public members to serve as Chairman or Chairwoman.

"(2) Five members of the Committee shall constitute a quorum.

"(3) The terms of office of the members of the Committee shall be three years, except that of the members first appointed, three members shall be appointed for a term of one year, three members shall be appointed for a term of two years, and three members shall be appointed for a term of three years, as designated by the President at the time of appointment.

"(b)(1) The Committee shall evaluate the manner in which this Act is carried out in order to determine whether the Act provides an adequate, prompt, equitable, and insurable system of compensation. Such evaluation shall include the following subjects:

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"(A) The amount and duration of permanent and temporary disability benefits and the criteria for determining the maximum limitations thereon.

"(B) The amount and duration of medical benefits assuring adequate medical care.

"(C) The extent of coverage of workers.

"(D) Occupational disease.

"(E) Rehabilitation.

"(F) The use of the special fund under section 44.

"(G) The efficiency of the administration of this Act by responsible parties.

"(H) The extent of the duplication or coordination of benefits.

"(I) Methods of implementing any recommendations made by the Committee.

"(2) The Committee shall transmit to the President and to the Congress an annual report containing a detailed statement of the findings and conclusions of the Committee, together with such recommendations as it deems advisable.

"(c)(1) The Committee, or any members designated by the Committee, may, for the purpose of carrying out this section, hold such hearings, take such testimony, and sit and act at such times and places as the Committee deems advisable. Any member authorized by the Committee may administer

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oaths or affirmations to witnesses appearing before the Committee, or any subcommittee or members thereof.

"(2) Each department, agency, and instrumentality of the executive branch of the Government shall furnish to the Committee, upon request made by the Chairman or any Vice Chairman, such information and such administrative assistance as the Committee considers necessary to carry out its functions under this Act.

"(d) The Committee may enter into contracts with Federal or State agencies, private firms, institutions, and individuals for the conduct of research or surveys, the preparation of reports, and other activities necessary to the discharge of its duties.

"(e)(1) Subject to paragraph (2), members of the Committee shall each be paid at the maximum rate of basic pay payable for grade GS–18 of the General Schedule under section 5332 of title 5, United States Code, for each day (including traveltime) during which they are engaged in the actual performance of duties vested in the Committee.

"(2) Any members of the Committee who are full-time officers or employees of the United States shall receive no additional pay, allowances, or benefits by reason of their service on the Committee.

"(3) Members of the Committee shall be entitled to reimbursement for travel, subsistence, and other necessary ex-

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penses incurred by them in the performance of their duties as members of the Committee as provided under section 5703 of title 5, United States Code.

"(f) The Committee shall not be subject to the provisions of the Federal Advisory Committee Act.".

SEC. 27. Nothing contained in the amendments made by this Act shall be construed to reduce the amount of any benefits being received under the Longshoremen's and Harbor Workers' Compensation Act by any individual on the date of the enactment of this Act.

THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1980

Introduced June 18, 1980 by Representative John N. Erlenborn

Brief Summary

PURPOSE

To substantially amend the Longshoremen's and Harbor Workers' Compensation Act [1] to correct deficiencies wrought by the Act's 1972 Amendments, in order to make the Act fair to all parties and the liabilities under it insurable, predictable, and affordable to employers subject to it; and to repeal obsolete provisions. The new Erlenborn bill is the product of further review of the Act since introduction of H.R. 2448 (Erlenborn) February 27, 1979 and represents a more comprehensive revision.

SCOPE OF AMENDMENTS

Both H.R. 2448 and the new Erlenborn bill address the major source of escalating costs experienced since 1972—uncertain jurisdiction, payment for deaths unrelated to employment, absence of a ceiling on death benefits, and an uncapped escalation of benefits geared to increases in the national average weekly wage,—and institutional shortcomings in placement of the Benefits Review Board under authority of the Secretary of Labor.

MAJOR PROVISIONS OF H.R. 2448 AND NEW ERLENBORN BILL

(1) Contract jurisdiction to more certain parameters; coverage would be dependent on status of an employee at the time of injury and on the point of injury. Covered employees are longshoremen, ship repairmen, shipbuilders, shipbreakers, and harbor workers. The troublesome, confusing "maritime employment" test enacted in 1972 is eliminated.

(2) Death benefits, payable to survivors of injured employees receiving compensation who die from causes unrelated to an employment injury are eliminated. No other workers' compensation law, State or Federal, includes this life insurance provision which was added in 1972.

(3) Death benefits are capped at 200 per cent of the national average weekly wage—the same cap applicable to living employee beneficiaries. Absence of this cap is admitted even by the Labor Department to be an oversight in drafting the 1972 Amendments. Without a cap, survivors of injured workers may receive more in benefits than the injured worker would have, had he lived. No other workers' compensation law contains this premium on death.

(4) The automatic annual cost-of-living benefits escalator is capped at 3 per cent, based on increases in the national average weekly wage. Open-ended indexing, adopted in 1972, has created a most significant risk-assessment problem for employers and insurance carriers. A rise in the annual escalator increases employer-carrier liability exponentially, leading to serious reserving problems.

(5) Integrity of the claims adjudication process is addressed in H.R. 2448 by deleting Benefits Review Board jurisdiction over Longshore Act cases. Compensation orders issued by Deputy Commissioners would be appealable to U.S. District Courts—the practice prior to 1972 when the Board was created by the Longshore Amendments.

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[1] Act of March 4, 1927 chapter 509, 44 Stat. 1424, as amended by Public Law 92-576, 86 Stat. 1251, 33 U.S.C. § 901, et seq.

The new bill establishes the Board as an agency independent of the Secretary of Labor whose members are appointed for fixed terms by the President and confirmed by the Senate. Administrative law judges are appointed by the Board, not the Secretary of Labor.

MAJOR ADDITIONAL CHANGES SOUGHT BY THE NEW ERLENBORN BILL

(1) The new bill includes a definition of harbor worker which is not defined in existing law or H.R. 2448. This category encompasses miscellaneous employees who are providing services on or for a vessel upon navigable waters, are not covered by a State workers' compensation act, and do not fall within the definitions of other covered employees—longshoreman, shipbuilder, ship repairer, or shipbreaker.

(2) The net tonnage exemption in the present Act (and not modified in H.R. 2448) is altered to a vessel-length exemption as a more appropriate and readily determinable measure of exclusion. Presently, any vessel under 18 net tons (capacity tons) is excluded. The new bill excludes any employee providing services on or for a vessel under 65 feet (about 70 net tons) if covered by a State workers' compensation program. Intent: Exclude recreational boat builders whom Congress never intended to cover but who were brought under the Act through Department of Labor interpretations.

(3) For the first time, provides a mechanism for offsetting Longshore Act benefits with the receipt of other benefits—Social Security old age and disability benefits, pensions, unemployment compensation, and any other workers' compensation benefit—to prevent pyramiding of benefits.

(4) Creates a Longshore Act advisory committee.

(5) Establishes a Conservation Committee, patterned after New York's statute, which is financed and operated by employers and insurance carriers who would have the responsibility of defending claims made on the Special (Second Injury) Fund. Liabilities against the Fund are increasing exponentially, as the Act's tremendous costs provide employers and insurance carriers with incentive to assert second-injury claims and assert Fund jurisdiction which limits employer-carrier liability.

(6) Re-defines wage-earning capacity for purposes of partial disabilities, by reference to the formula recently adopted by Florida and the District of Columbia which requires an employee to establish the relationship between wage loss and employment. Measures wage-earning capacity with reference to actual post-injury earnings, and earnings which would have been realized should an employee voluntarily limit his income.

(7) Prohibits double recovery for scheduled and unscheduled awards (made pursuant to loss in wage-earning capacity).

(8) Pays employee full compensation while undergoing rehabilitation but suspends benefits while he unreasonably refuses rehabilitation.

(9) Permits an employee to choose a treating physician from an approved listing qualified by the Deputy Commissioner, suspends compensation during period of unreasonable refusal to submit to medical treatment, modifies reporting requirements of attending physicians, and generally transfers Secretary's authority to supervise medical treatment to deputy commissioners. The thrust is to insulate the process from proven abuses by physicians and employers.

(10) Updates method for determining average weekly wage—the basis on which benefits are determined.

(11) Gears benefits to 80 per cent of after tax income, instead of 66⅔ per cent of average weekly wage.

(12) Speeds up claims process and expedites issuance of compensation orders.

(13) Repeals numerous obsolete provisions which have been in the Act since its initial passage in 1927.

COST REDUCTION ESTIMATES

The National Council on Compensation Insurance, a voluntary, nonprofit, unincorporated association of insurers licensed by State insurance agencies in 31 jurisdictions and filling an advisory role in others, estimated that the combined effect of removing unrelated death benefits and of placing a maximum on weekly benefits in death cases of 200 per cent of the national average weekly wage would reduce premiums 2.5 per cent. In combination with a 3 per cent cap on the annual benefits escalator, premiums would fall 9.9 per cent.

SECTION-BY-SECTION SUMMARY AND EXPLANATION OF H.R. 7610, THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1980

Introduced June 18, 1980 by Mr. Erlenborn (for himself, Mr. Edwards of Alabama, Mr. Edwards of Oklahoma, Mr. Goodling, Mr. McCloskey, and Mr. Buchanan).

PURPOSE

To substantially amend the Longshoremen's and Harbor Workers' Compensation Act to correct deficiencies wrought by the Act's 1972 Amendments, in order to make the Act fair to all parties and the liabilities under it insurable, predictable, and affordable to employers subject to it; and to repeal obsolete provisions. H.R. 7610 is the product of further review of the Act since introduction of H.R. 2448 (Erlenborn) February 27, 1979 and represents a more comprehensive revision.

SCOPE OF AMENDMENTS

Both H.R. 2448 and H.R. 7610 address the major source of escalating costs experienced since 1972—uncertain jurisdiction, payment for deaths unrelated to employment, absence of a ceiling on death benefits, and an uncapped escalation of benefits geared to increases in the national average weekly wage,—and institutional shortcomings in placement of the Benefits Review Board under authority of the Secretary of Labor.

Sec. 2. Definitions

Section 2 consolidates the definitions and coverage provisions of sections 2 and 3 of the Act and, in concert with the amendment to section 3 (section 3 of the bill), re-defines jurisdiction of the Act. Coverage, as in the present Act, is determined through a two-pronged test of situs and status; but the troublesome and confusing "maritime employment" test of status, adopted in 1972, is eliminated. Status is limited to employees falling within the covered employment categories of longshoreman, harbor worker, shipbuilder, shiprepairman, and shipbreaker who are injured while performing activity in connection with their employment category. Situs is determined by reference to the applicable employment category. For shipbuilding, shiprepairing, shipbreaking, and harbor worker operations, situs is present only if the employee is injured over navigable waters. If a longshoreman, situs is seaward of the point of rest, defined separately for containerized and non-containerized cargo.

To the Act's present exclusions are added employment categories not direct and integral parts of vessel loading, unloading, repairing, building, or breaking. The present exclusion of vessels under 18 net (capacity) tons is changed to a 65-foot vessel-length exemption (about 70 net tons) which is more easily determinable than capacity tons and—effectively excludes virtually all recreational boat operations over navigable waters, but only if an injured employee is otherwise covered by a State workers' compensation law. Recreational boats over 65 feet on navigable waters on which the employee is engaged in shipbuilding, shiprepairing, or shipbreaking operations would be covered by the Act. Recreational boat operations on land are treated as shipbuilding, shiprepairing, or shipbreaking and, because they occur landward of the water's edge, are excluded, regardless of vessel length. Recreational boats, while not expressly covered, were brought under the Act through Department of Labor interpretations in 1975 (Notice 21, June 6, 1975) and affirmed in 1977 (Program Memorandum 58, August 10, 1977).

For the first time, "harbor worker" is defined: As anyone performing services on or for a vessel upon navigable waters, unless covered by State workers' compensation. This category would include any miscellaneous employees who might fall between jurisdictional cracks and to exclude employees whose activities do not bear a significant relationship to navigation or to commerce on navigable waters and who in recent years may arguably have been brought under the ambit of "harbor worker."

(See *Fusco* v. *Perini North River Association*, 601 F. 2d 659 (2d, Cir. 1979) judgment vacated and remanded, —— U.S. —— (1979); reversed on remand, — F. 2d —, June 4, 1980.)

Also redefined is "wages" to permit inclusion of only wages earned in covered employment, excluding wages earned in secondary employment (so-called "moonlighting" income).

Sec. 3. Coverage

Section 3(a) is amended by providing compensation in respect of the death or disability of any "employee," repealing language adopted in 1972 which extended coverage shoreward of the waters edge to points uncertain. Exclusions noted in section 3(a) are moved to section 2.

Sec. 4. Maximum and Minimum Compensation

To foster an incentive to return to work, section 6 is amended by substituting 80 percent net spendable earnings (after-tax income) for 66⅔ percent of an employee's average weekly wage as the basis for computing compensation.

Adding "death" after "disability" in section 6(b)(1) caps death benefits at 200 percent of the national average weekly wage, correcting a drafting oversight in the 1972 Amendments and reversing the Supreme Court's 1979 decision of *Rasmussen* v. *Director, Office of Workers' Compensation Programs.* 440 U.S. 29 (1979).

Sec. 5. Medical services and supplies

Sections 7 (b) through (f) are amended by:

Requiring an injured employee to select a physician from a listing submitted by the employer and approved by the deputy commissioner;

Deleting an employee's automatic right to change physicians;

Requiring an employee to request further treatment within 21 days after initial treatment to hold an employer liable;

Requiring suspension of compensation for an employee's unreasonable refusal to undergo treatment or examination;

Modify attending physicians' reporting requirements and deleting Secretary's authority to excuse late submission of physician reports;

Requiring estimates of physical impairment by an independent panel of specialists approved by the deputy commissioner to be in accordance with the American Medical Association's Guides to the Evaluation of Impairment;

Permitting the cost of such examinations to be levied against the employer, carrier, Special Fund or, characteristically, where uncooperative, the employee;

Requiring the panel, on the employer's request, to determine the extent to which the degree of impairment is attributable to a pre-existing impairment (with reimbursement from the Special Fund with respect to the degree of impairment not attributable to the injury);

Repealing the prohibition (added in 1972) against the use of physicians for impartial examinations who during the prior two years had been employed by, or accepted or participated in any fee relating to a workers' compensation claim from any insurance carrier or self-insurer.

The thrust of these amendments to section 7 is to repeal the Secretary's authority to supervise medical treatment, returning such authority to deputy commissioners—civil service employees—thus preserving the integrity of the medical review process; streamlining delivery of medical services by placing strict time limits on submission of physician reports; enlarging the universe of specialists eligible for service on impartial panels; and insulating the system from proven abuse by employees and physicians by limiting an employee's choice of treating and specializing physicians.

Sec. 6. Compensation for disability

Section 8 is amended by:

Limiting compensation for all categories of disability (except for schedule awards payable in lump sum for loss of body member or function) to 80 percent of net spendable earnings, to encourage rehabilitation and return to work;

Continuing payment of permanent total awards for employee's life but tightening eligibility for permanent total status to comport with Internal Revenue Service definition of permanent total, as permanent inability to earn any wages in any employment;

Ceasing payments for temporary total disability and unscheduled permanent partial disability no later than an employee's retirement age, in recognition of either his transfer to permanent total status by retirement or his continued earning of some wages by virtue of his non-totally disabled status;

Permitting an employer to suspend or reduce compensation during any period the employee's actual wages or wage-earning capacity increase, equal, or exceed his average weekly wage prior to the injury. The deputy commis-

sioner must review the employer's action within 30 days; failure to do so constitutes affirmance. Decisions by the deputy commissioner are reviewable by an administrative law judge;

Prohibiting simultaneous award for losses compensable pursuant to the schedule and for loss of wage-earning capacity, thus preventing double recovery for the same disability;

Repealing provision for award of death benefits to survivors of deceased permanently partially disabled employees who die of causes unrelated to their injury (correcting another amendment added in 1972). This constitutes a life insurance provision that is entirely inappropriate to a workers' compensation law and which appears in no other workers' compensation law, State or Federal;

Adding new subsection (f)(3), patterned after New York's statute, wherein a conservation committee of employers and carriers recommends (and the Secretary of Labor designates) an attorney to represent (as a party) the Special (Second Injury) Fund where application for apportionment of liability is asserted under (f)(1) or (2). The representative's purpose is to defend the Fund, authority which the Secretary claims not to possess, against unwarranted assertions of Fund jurisdiction by employers who desire to limit their liability to 104 weeks' compensation. The Act's spiraling costs have provided many employers with an incentive for doing so, with resultant exponential annual increases in the Fund's liability;

Continuing present authorization for payment of compensation during rehabilitation but eliminating the maximum additional $25 per week benefit as an anachronism, and adding mandatory suspension of compensation for periods of refusal to undergo rehabilitation without right to subsequent retroactive award of benefits for such period of refusal;

Re-defining (and tightening) the definition of wage-earning capacity (in cases of unscheduled permanent partial and temporary partial disabilities), reflecting language recently adopted by Florida and the District of Columbia, placing on the employee the burden of establishing the relationship of his wage loss to employment and measuring wage-earning cpacity by reference to actual post-injury earnings and earnings realizable but for an employee's voluntary limitation of his income;

Adding to existing authority of deputy commissioners to approve settlement of disability benefit (compensation and medical benefits) cases, authority to approve settlements of death cases, and imposing a 30-day period within which the deputy commissioner may disapprove the settlement. Disapprovals must be for good cause and are appealable by any party to the settlement. While deputy commissioners presently possess settlement authority, their application of this authority throughout compensation districts is reported to be uneven. Furthermore, the Department of Labor which is philosophically opposed to settlements as not comporting with an employee's best interest, is precluded from entering the settlement process.

Sec. 7. Compensation for death

Section 9 is amended by:

Repealing payment of death benefits to survivors of deceased permanently totally disabled employees who die of causes unrelated to their injury (correcting another amendment added in 1972) which constitutes a life insurance provision that is entirely inappropriate to a workers' compensation law and which appears in no other workers' compensation law, State or Federal;

Limiting benefits to 80 percent of the deceased's net spendable earnings; and

Subjecting this benefit to a cap of 200 percent of the national average weekly wage, correcting a drafting oversight in the 1972 amendments permitting survivors to receive more in benefits than the deceased, had he survived. Accordingly, the Supreme Court's 1979 decision in *Rasmussen* v. *Director, Office of Workers' Compensation Programs* is overturned.

Sec. 8. Determination of pay

Section 10 is amended by:

Revising the method for determining an employee's average weekly wage to eliminate the anachronistic computation of average annual earnings based on a daily rate prior to computation of a weekly rate, which reflected the intinerant nature of longshore employment in 1927;

Determining average weekly wage by differing formulas depending on whether the employee worked substantially the whole of the year preceding injury, or in the same or different employment than that in which he was injured. This provision addresses the distortion of an average weekly wage, where an employee earnings substantially more in non-covered employment, is later injured while working in covered employment. In such cases, the employee's average weekly wage is limited tojwhat it would have been had he worked substantially the whole of the year in covered employment;

Repealing obsolete provision for determining average weekly wage of a minor, in view of declining participation of minors in the workforce of covered employers and of their provision, in any case, under collective bargaining agreements;

Repealing authority for including an employee's wages earned outside covered employment (so-called "moonlighting" wages) to prevent distortion in average weekly wage determinations;

Capping the annual benefits cost-of-living escalator at 3 percent, to encourage more frequent review of the Act and to address serious reserving problems encountered by insurers since 1972.

Sec. 9, Notice of injury or death

Section 12(d) is amended by requiring actual knowledge by the employer of an injury or death to toll the statute of limitations on filing a claim. This amendment prevents successful claims filed beyond the statutory period, based on an employer's constructive knowledge of the employee's condition.

Sec. 10, Payment of compensation

Section 14 is amended by:

Requiring an employer's actual knowledge of an injury or death before liability arises for payment of compenastion and/or penalties and before the period for filing a notice of controversion of the claim begins to run. Presently, an employer may be penalized for failing to commence compensation payments for claims of which he had no actual knowledge;

Prohibiting levying on employers a 20 percent penalty of any additional compensation awarded an employee on appeal so long as the employer has been paying the employee compensation pursuant to the appealed deputy commissioner's award. Presently, section 14(f) is interpreted as permitting such penalties;

Extending from 16 to 30 days the period within which the employer must file a notice of final payment of compensation with the deputy commissioner;

Striking subsections (h) and (j) as redundant, the gist of the former provision finding its way into rewritten section 7, and the latter's authority over lump sum settlements reposing in section 8(i)(2);

Adding new subsection (l), capping compensation for unscheduled permanent partial disabilities at 312 weeks (six years), identical to maximum compensation paid under a scheduled loss. This change recognizes an injured employee will, after six years, have returned to work or applied for permanent total status;

Adding new subsection (m) which for the first time offsets the Act's benefits with the concurrent receipt of Social Security benefits, pensions, unemployment compensation, or any other workers' compensation benefit, if the aggregate exceeds 80 percent net spendable earnings. Its purpose is to prevent the pyramiding of benefits through which injured employees may actually earn more while disabled than while working, thus discouraging a return to work.

Sec. 11. Procedure in respect of claims

Section 19 is amended by:

Requiring a deputy commissioner to issue a compensation order within 180 days following notice of the employee's resumption of employment or of certification of the employee's permanent medical condition. Such rulings, if not contested within 30 days become final and not subject to review. The purpose is to expedite the claims review process;

Striking subsection (d), (e), and (h). The substance of (d) and (e), providing for hearings by administrative law judges in accordance with section 554 of title 5, United States Code, and the filing of compensation orders with the deputy commissioner, is now found in sections 21(b)(1)(A) and (B). Sub-

section (h), relating to independent physical examinations, is unnecessary in view of consolidation of all medical provisions in section 7.

Sec. 12. Presumptions

Section 20 is repealed. These presumptions, particularly that assuming coverage of the Act, have been shown to invite the filing of unjustified or exaggerated claims and, accordingly, have raised an employer's costs considerably. An employee alleging a work-related injury should provide evidence of same; and an employer's justifiable questions concerning a claim's validity should be considered on their merits in light of the employee's evidence without the intrusion of what has become an almost irrebuttable presumption in favor of the claimant.

Sec. 13. Review of compensation order

Section 21 is substantially amended by:

Establishing the Benefits Review Board as an independent agency, with three members appointed by the President and confirmed by the Senate to fixed six-year terms. The Chairman is designated by the President. The Board is empowered to appoint administrative law judges. The Secretary of Labor, through the Solicitor, is prohibited from litigating before the Board. These changes remove Longshore Act and Black Lung appeals from the purview of the Secretary and, accordingly, assure the judicial integrity of the claims review process;

Expediting the claims review process by imposing on administrative law judges reviewing deputy commissioner compensation orders a 30-day post-hearing requirement for issuance of their decisions, with 30 days thereafter allowed for filing an appeal of such decisions with the Board;

Assuring that payment of amounts, other than periodic compensition and death benefits, required by an administrative law judge or the Board are stayed pending conclusion of the proceedings. Accordingly, the employer need not pay interest penalties and attorney fees on amounts later determined payable, so long as the employer continues payments pursuant to a deputy commissioner's compensation order. This comports with amendments to section 14(f), where the employer appeals a deputy commissioner's compensation order but continues making periodic payments pursuant to the order;

Providing for transition of the Board from an entity of the Department of Labor to an independent agency.

Sec. 14. Appearance of U.S. attorney for Secretary of Labor or Deputy Commissioner

Section 21(a), granting the Secretary authority to appoint attorneys to represent the Board in court proceedings, is repealed in view of the Board's independence and authority to select its own counsel.

Sec. 15. Procedure before the Deputy Commissioner

Section 23 is repealed as redundant in veiw of amended sections 21 and 24. Section 23 provides for formal hearings before a deputy commissioner and the Board. Under the bill (and, in fact, under the 1972 Amendments) the deputy commissioner does not hold formal hearings; his recommendations are accepted by the parties or appealed to the Board pursuant to section 21's procedures.

Sec. 16. Witnesses

Section 24 is amended by:

Designating present section 24 as 24(a) and adding to its scope proceedings before an administrative law judge, expressly authorizing the taking of claimant depositions and interrogatories, and conforming venue provisions to others in the Act;

Authorizing deputy commissioners and administrative law judges to issue subpoenas, administer oaths, and examine witnesses, in accordance with the Federal Rules of Civil Procedure. The Federal Rules assure broad rights of discovery, and their statutory specification in the Act precludes precipitous rule changes taken administratively and, thus, applicable solely to proceedings under the Act. This subsection permits repeal of section 27(a).

Redesignating section 27(b) as section 24(c), relating to contempt powers vested in deputy commissioners and the Board, adding administrative law judges to its scope.

Sec. 17. Witness fees

Section 25 is amended by adding administrative law judges to its scope.

Sec. 18. Power of Deputy Commissioners

Section 27 is repealed as redundant, as explained above.

Sec. 19. Fees for services

Section 28 is amended by:

Limiting assessment against employers of a claimant's attorney fees to cases before the Board or the courts; and requires fees to be a lien on compensation;

Further limiting the payment of attorney fees for services before the Board or courts to cases where claimant successfully prosecutes his claim, following the employer's controversion of same;

Deleting authority for payment of attorney fees to a claimant receiving compensation in the absence of a compensation award who later obtains an award for additional compensation;

Repealing subsection (d), thus prohibiting additional assessment of other litigation costs against an employer, where the employer is otherwise liable for payment of claimant's attorney fees;

Redesignating subsection (e) as (d); and deleting the deputy commissioner's authority to approve fees, in view of payment of fees only for services before the Board or courts, subject to their approval.

Sec. 20. Reports

Section 30 (f) is amended by:

Tolling the statute of limitations (section 13(a)) only if the employer has notice or actual knowledge of the injury and its employment relationship;

Deleting an employer's agent ". . . in charge of the business in the place where the injury occurred" as an employer's representative to whom knowledge of a claim may be imputed. In a stevedoring context, the agent is commonly a timekeeper who is also a member of the claimant's union.

Sec. 21. Compensation for injuries where third persons are liable

Section 33 is amended by:

Making conforming amendments in subsections (b) and (e);

Codifying in subsection (f), the Supreme Court's 1979 decision in *Edmonds* v. *Compagnie General Transatlantique* which upheld compensation, as the employer's sole liability to an employee who successfully asserts a third party claim, and the employer-carrier's compensation lien on a third party award. The Court's opinion reaffirms earlier decisions and the intent of the 1972 Amendments that the employer's sole liability *to any party* is limited to payment of compensation;

Requiring payment of claimant attorney fees and expenses from the excess remaining after exercise by the employer of its compensation lien;

Requiring an employee, who enters into a settlement with a third party for an amount less than compensation otherwise payable, to obtain the employer's and carrier's approval;

Relieving the employer of his obligations to pay future compensation where a settlement is reached and the employee fails to inform, and win the approval of, the employer-carrier of such settlement, or where the employee fails to notify the employer of any third party judgment in his favor.

The thrust of amendments to subsection (g) is to preserve the employers' compensation lien on amounts received from a third party, where the employee either enters into a secret settlement with the third party or fails to notify the employer of a third party award.

Sec. 22. Administration and vocational rehabilitation

Section 39 is amended by:

Eliminating the Secretary of Labor's authority to provide claimants with legal assistance in processing a claim. The Secretary still provides information and assistance relating, to the Act's coverage and compensation, and to procedures for obtaining compensation. Negated by virtue of this change are also regulations interpreting the Secretary's authority to provide legal assistance to encompass appearances by the Solicitor on behalf of claimants

with cases before administrative law judges, the Board, and Circuit courts of appeal. The Solicitor reports the Department never has been requested by any claimant to appear on his behalf; but the language in section 39(c)(1) authorizing assistance (read: appearances) "upon request" does not clarify from whom such request must be made. The Department has arrogated unto itself the decision when to appear.

These intrusions politicize the compensation review process and are hereafter prohibited by amended section 39(c)(1), removal of the Board from the control of the Secretary, and;

Limiting the Secretary's participation after enactment to intervention before a court.

Sec. 23. Deputy Commissioners

Section 40(f) is amended by adding "administrative law judges," as a conforming change.

Sec. 24. Special fund

Section 44(j)(2) is amended by adding authority for assessment against the Special Fund for expenses incurred by the Advisory Committee on Longshoremen's and Harbor Workers' Compensation Act established in section 26 of the bill; and makes other conforming changes.

Sec. 25. Repeal of obsolete provisions

Sections 45 (Administration Fund), 46 (Appropriations), and 47 (Availability of Appropriations) are repealed.

Sec. 26. Advisory committee

New section 53:

Establishes a permanent advisory committee on the Longshore Act, comprised of nine members appointed by the President for three-year terms and compensated at grade GS–18;

Grants the Committee wide latitude to evaluate the Act's operations;

Requires its annual report to the President and Congress;

Permits the Committee to hold hearings.

Sec. 27. Effect of amendments

No provision of these amendments reduces any benefit now being received. However, the amendments otherwise apply to present beneficiaries and claimants.

O